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No. 94-790

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

ZIYA K. KORAY, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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December 23, 1994

QUESTION PRESENTED

Whether "official detention" in 18 U.S.C. § 3585(b) includes a court order of confinement in a jail-type facility such as a halfway house as a condition of bail.

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The respondent, Ziya K. Koray, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Third Circuit's opinion in this case. That opinion is reported at 21 F.3d 558.

On April 25, 1994, the United States Court of Appeals for the Third Circuit reversed the district court's denial of Koray's habeas corpus petition, finding that "official detention" for purposes of sentence credit under 18 U.S.C. § 3585 includes time spent under conditions of jail-type confinement. (Pet. 23a). In reaching this conclusion the court of appeals was persuaded by factual allegations in Koray's habeas corpus petition, which were

unchallenged by the Bureau of Prisons (BOP or Bureau), and indicated that he was subjected to substantial restrictions on his liberty. Specifically, the court stated that Koray was permitted to leave the facility only once in 150 days (for a medical exam), he had to account for his presence five (5) times a day, he was subject to random breath and urine tests, his access to visitors was limited in both time and manner, and there was a paucity of vocational, educational, and recreational services compared to a prison facility. (Pet. 19a-20a). The court of appeals stated that the BOP admitted that the halfway house in question was maintained similar to the manner in which the BOP may operate such a facility. (Pet. 20a).

The court of appeals began its analysis of the relevant question by reviewing the history of the credit statutes. (Pet. 3a-5a). The court opined that Congress has been expanding jail credit since 1966. This trend has continued and in 1984, Congress rewrote Section 3568 and changed it to its present form in Section 3585, which enlarged the class of defendants eligible to receive credit by replacing the term "custody" with the term "official detention". (Pet. 4a-5a).

The court of appeals wrote that it has had few opportunities to consider the scope of either Section 3585 or its predecessor. (Pet. 5a-7a). Other courts of appeals that have considered this issue are divided. Most courts of appeals have determined that Section 3585, like its predecessor Section 3568, does not require the BOP to credit presentenced defendants whose bail conditions

allowed them to be confined outside BOP facilities; however, that conclusion was not reached without dissent. (Pet. 7a-8a). The court of appeals noted that the Ninth Circuit has rejected the conclusion reached by the other circuits, holding instead that when conditions of release approach those of incarceration, a detainee is in "official detention" for purposes of Section 3585. (Pet. 8a).

The court also noted that some of the courts, in denying credit, have deferred to the interpretation of the statute adopted by the BOP. (Pet. 8a). The court opined that it would not defer to the BOP's interpretation of the statute because it appears in a Program Statement, which is merely an internal agency guideline and may be altered at will, rather than in published regulations subject to the rigors of the Administrative Procedures Act, including public notice and comment. (Pet. 9a).

The court of appeals observed that the rationale given by the Bureau for its refusal to award credit for time spent by a pretrial detainee in a halfway house is different under Section 3568 than under Section 3585. (Pet. 9a-11a). Previously, under Section 3568, the Bureau focused on the degree of restraint, distinguishing between time in a residential community center as opposed to time in a jail-type facility. The court refers to this as a functional analysis. (Pet. 9a-10a). The BOP, however, has interpreted Section 3585 in terms of whether the defendant has been released to pretrial services or detained by the Attorney General pursuant to 18 U.S.C. § 3142(a). (Pet. 10a).

The court of appeals noted that this distinction in approaches is highly significant for Koray because under the earlier rationale he might have been able to convince the BOP or a court that his conditions of confinement in the Volunteers of America facility were similar to those in a jail-type facility and that credit was appropriate. Koray does not have that opportunity under the BOP's current rationale because he is clearly in the custody of pretrial services rather than the Attorney General. (Pet. 11a).

The court of appeals stated that in order to determine if this change in rationale withstands the "reasoned analysis" standard, the court must examine the statutory change from "custody" to "official detention" in Sections 3568 and 3585. (Pet. 11a). The court further stated that the legislative history of this change is unenlightening, and Congress used the terms "custody", "official custody", "confinement", and "official detention" interchangeably. Also, the court noted that the title of Section 3585(b) remained as "Credit for Prior Custody". (Pet. 11a-13a).

The court of appeals concluded, as have all other circuits to have considered the issue, that use of the words "official detention" rather than "custody" was not meant to alter the meaning of the statute. (Pet. 13a). Therefore, before the court could defer to the BOP's interpretation of this statutory change, they must determine whether the BOP had any sustainable rationale for reading "official detention" as if it provided "official

detention by the Attorney General or the BOP". (Pet. 13a). The plain meaning of the words does not require this result and there is nothing in Section 3585 which mandates or even suggests that a defendant must be under the detention of the BOP. (Pet. 13a-14a). A court may detain a person as officially as the Attorney General. (Pet. 14a).

The court concluded that it is difficult to view Koray's detention as other than "official" since he was in the custody of pretrial services and confined to a halfway house by court order. (Pet. 14a). Koray's failure to comply with the conditions of release would subject him to a felony prosecution which provides more severe punishment than an escape charge. (Pet. 14a).

Additionally, the BOP does not always limit "official detention" to that served under the custody of the Attorney General. The BOP has characterized other custody as "constructive felony custody" and has given presentenced defendants credit under both Section 3585 and Section 3568 for certain time spent in state facilities, even though the defendant was not in the Attorney General's custody. (Pet. 14a-17a).

The court of appeals concluded that it could not afford even minimal deference to the BOP's interpretation of Section 3585 because of the complete absence of support for their position in the statute as well as the legislative history. (Pet. 18a).

The court of appeals stated that in construing the statutory language of Section 3585, it cannot ignore the obvious and ordinary meaning of the statutory language. To most people,

being forced to live in a halfway house is to be held in custody. (Pet. 18a).

The Third Circuit commented that other organizations agree with their interpretation of "custody", including the American Bar Association and the National Advisory Commission on Criminal Justice Standards and Goals. (Pet. 18a-19a).

The court of appeals opined that they are not prepared to consider all alternative sentencing mechanisms as creditable, and that they agree with Judge Heaney, writing for the dissent in Moreland v. United States, 968 F.2d 655, 664 (8th Cir.) (en banc) (plurality), cert. denied, ___ U.S. ___, 113 S.Ct. 675 (1992), that the degree of confinement is what is at issue. (Pet. 19a).

The court stated that the BOP argued that a bright-line rule is necessary for administrative purposes. The court also stated that some courts have agreed. The facts, however, in many of those cases were not as "jail-like" as in the instant case. (Pet. 20a).

The court of appeals held that it will not be administratively difficult to give credit for time served by defendants under jail-type detention. The court stated further that few defendants will be affected by this ruling because only a small percentage of federal defendants are released on bail to a halfway house. (Pet. 21a). The court also noted that the BOP was able to incorporate the Ninth Circuit's decision into its Program Statement, and that there have not been any allegations, much less evidence, that this overwhelmed the BOP's

administrative process. (Pet. 21a-22a).

The court determined that it would be inherently unfair to deny credit to a defendant who sought bail but was confined under jail-like conditions without giving the defendant notice that this would occur. The Third Circuit noted that the defendant may have decided against requesting bail under these circumstances. (Pet. 23a). Further, the court noted that the Government continues to derive the full benefits of incarceration, protecting the public and ensuring the defendant's presence in court, at a lower cost, while preserving scarce jail space for the truly dangerous offenders. (Pet. 23a).

Therefore, the Third Circuit concluded that "official detention" for purposes of credit under 18 U.S.C. § 3585 includes time spent under conditions of jail-type confinement. The court stated that this decision is consistent with the language of the statute, Congress' intent and the BOP's rationale under Section 3568. (Pet. 23a). Finally, the court opined that their ruling should not be difficult to apply because it is limited to the few defendants who were or will be housed pretrial, in jail-like situations. (Pet. 23a). The court of appeals remanded the case to the district court for a factual finding of the circumstances surrounding Koray's presentence incarceration. (Pet. 24a).

REASONS WHY THE PETITION SHOULD BE DENIED

1. The petition inaccurately argues that the court of appeals' decision in the instant case creates a three-way split

in the circuits. The Third Circuit's holding that "official detention" for purposes of credit under 18 U.S.C. § 3585 includes time spent under conditions of jail-type confinement, (Pet. 23a), is virtually the same as the Ninth Circuit's decisions in Fraley v. United States Bureau of Prisons, 1 F.3d 924, 925-26 (9th Cir. 1993); Lahey v. Floyd, 992 F.2d 234, 235-36 (9th Cir. 1993); Mills v. Taylor, 967 F.2d 1397, 1400-01 (9th Cir. 1992); and Brown v. Rison, 895 F.2d 533, 536 (9th Cir. 1990), where the court held that when conditions of release approach those of incarceration, a detainee is in "official detention" for purposes of Section 3585. (Pet. 8a). Thus, there is a two-way, not three-way split in the circuits.

This split was created when the Ninth Circuit decided Brown v. Rison in 1990. The Government did not seek rehearing en banc in the Ninth Circuit at that time, nor did the Solicitor General petition this Court to review the issue. Further, the Solicitor General never sought this Court's review of this issue in several other cases decided by the Ninth Circuit in 1992 and 1993, which followed Brown v. Rison.

In fact, rather than challenging the Ninth Circuit's approach to this presentence credit issue, the BOP revised its Program Statement 5880.30(7)(b)(6) to accommodate the Ninth Circuit's decision in Brown. (Pet. 22a). There is no reason why the BOP cannot accommodate the Third Circuit's ruling in a similar fashion.

Additionally, the petition suggests that the split between

the Third and Ninth Circuits and the other circuits that have ruled on this issue is rather clear cut. (Pet. 5). To the contrary, as illustrated by the court of appeals, the conclusions of the other circuits have not been reached without dissent. See, Moreland v. United States, 968 F.2d 655, 659-60 (one judge concurring in judgment and five judges dissenting); United States v. Wickman, 955 F.2d 592, 594 (8th Cir. 1992) (Lay, C.J., dissenting); Randall v. Whelan, 938 F.2d 522, 545 (4th Cir. 1991) (Butzner, J., dissenting); United States v. Westmoreland, 974 F.2d 736, 740-45 (6th Cir. 1992) (Engel, J., dissenting), cert. denied, ___ U.S.___, 113 S.Ct. 1818 (1993). (Pet. 7a-8a).

2. The Solicitor General and the BOP are using the instant case to revisit an issue which this Court previously declined to review two years ago on December 7, 1992, in Moreland v. United States, 113 S.Ct. 675 (1992) (No. 92-458). (Pet. 14).

3. The petition grossly exaggerates the effect of the court of appeals' decision by arguing that the BOP is not equipped to make the factual determinations that the Third Circuit's decision will require, that the BOP will not have access to the information it needs to make presentence credit decisions, that the BOP will be unable to rely on information it receives from privately operated community treatment centers, that the BOP will now be required to investigate conditions of confinement and that the court of appeals' decision will create a flood of cumbersome

litigation[1]. (Pet. 14-18). The fact is that none of the above conditions have presented themselves as a result of the Ninth Circuit's 1990 decision that a detainee is in "official detention" as stated in 18 U.S.C. § 3585 when conditions of release approach those of incarceration. As observed by the court of appeals, "the Bureau was able to incorporate the Ninth Circuit's decision into its Program Statement, and there is no allegation, much less evidence, that this overwhelmed the Bureau's administrative process." (Pet. 21a-22a).

Few defendants will be affected by the court of appeals' decision. This case is limited to its facts and will have little applicability to other situations. In the first instance, it is very rare for a defendant to be confined pretrial to a community treatment center or halfway house. Secondly, it is even more unusual for a defendant to be confined to such a location twenty-four (24) hours a day without the opportunity to leave for work purposes. (Pet. 21a).

The BOP is seeking this Court's review of this issue because they want a bright-line rule which denies credit to all defendants who are confined pretrial under jail-like conditions.

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[1] The facts relied upon in the petition with regard to Bilgrami v. Turner, No. 93-7793 (July 13, 1994), are clearly inaccurate. (Pet. 17, n.8). Mr. Bilgrami was not residing at a luxury condominium located in an exclusive Tampa, Florida development, where he was to pay for private guards who would ensure that he appeared for trial. He was imprisoned in a housing unit, not his own home, for nearly two (2) years, where he was guarded twenty-four (24) hours a day by armed officers who were under court order to arrest him if he attempted to leave the apartment. Bilgrami's movement was completely restricted, and for all practical purposes he was in jail.

They perceive that such a ruling would be easier for them to implement. However, the BOP has completely ignored "the inherent unfairness in declining to grant credit to a defendant who sought bail but was confined under jail-like conditions without giving the defendant notice that this would be the result. Some defendants, such as Koray, might choose not to request bail under these circumstances, particularly if the alternative is 'official detention' in a minimum-security type institution with facilities superior to those in the halfway house in question." (Pet. 23a).

Further, it is unfair to deny credit for pretrial confinement when the defendant would be entitled to credit for the exact same type of confinement had it occurred postsentence. (Pet. 20a). The Government is deriving all of the benefits of pretrial incarceration, including protecting the public and ensuring the defendant's presence at trial, at a lower cost, while also freeing scarce jail space for truly dangerous offenders. (Pet. 23a).

4. The petition erroneously argues that the BOP's interpretation of 18 U.S.C. § 3585(b) is accurate, and that the Third Circuit erred in rejecting it. (Pet. 7-13).

a. The petition inaccurately argues that "official detention" in Section 3585(b) is the same as detention under 18 U.S.C. § 3142, the Bail Reform Act, because both statutes were enacted at the same time as part of the Comprehensive Crime Control Act of 1984. (Pet. 7-8). This assertion is based upon a misinterpretation of Sections 3585 and 3142.

Congress specifically equated "official detention" in 18 U.S.C. § 3585 with "custody" by entitling the section "Credit for Prior Custody." (Pet. 12a-13a). Congress references "release in the custody of" in 18 U.S.C. §§ 3142(c)(B)(i), 3142(c)(B)(xiii), and 3142(i) rather than simply "release". The precise articulation in both statutes, where the same term "custody" appears, indicates that sentence credit may be granted under a technical "release in custody" order, not just under a technical order of detention. Surely, if Congress had intended to exclude credit for persons who were "released in custody" in conditions of confinement, it would not have included the term "prior custody" when it enacted Section 3585 and its predecessor, Section 3568.

As stated above, Congress enacted Sections 3585 and 3142(c)(B)(i) at the same time, thereby enlarging the class of defendants who are eligible for credit for prior custody. Previously, the only individuals who could obtain credit were those who were "detained." However, with the enactment of Sections 3585, 3142(c)(B)(i) and 3142(i), all defendants who are "released in custody" are also eligible for credit for prior custody.

There is nothing in the legislative history of Section 3585 to indicate that "official detention" should be construed as narrowly as the petition suggests. Cf. Perrin v. United States, 444 U.S. 37, 49-50 (1979). In fact, the legislative history demonstrates that Congress has continually expanded the class of

persons authorized to receive sentence credit for pretrial custody. See, Moreland v. United States, 968 F.2d at 664 (Heaney, J., dissenting).

The petition offers no authority for the argument that Congress, when it passed Section 3585, intended that Section 3142 should become the standard for determining "official detention" in the matter of credit for time served. See, Mills v. Taylor, 967 F.2d at 1400 ("detention" for purposes of Section 3142 is not synonymous with term as used in Section 3585); Moreland v. United States, 968 F.2d at 660 (same); United States v. Davis, 763 F.Supp. 638, 641 (D.D.C. 1991). See also, United States v. Wickman, 955 F.2d at 593 (Lay, C.J., dissenting) (Section 3585's legislative history is too scanty to discern Congressional intent). Rather, "custody" has always been the appropriate standard.

The court of appeals recognized that the plain meaning of the words "official detention" is critical to this analysis. (Pet. 13a, 18a). Section 3585(b) does not specifically require or suggest that a defendant be under the official detention of the Attorney General or the Bureau of Prisons. The statue merely says "official detention". (Pet. 13a-14a). The court of appeals acknowledged that a court may detain a person as officially as the Attorney General, and that it is difficult to view Koray's detention as other than "official" since he was put in the "custody" of pretrial services, and was confined to the halfway house by court order. (Pet. 14a).

The court of appeals noted that the BOP does not always limit "official detention" to that served under the custody of the Attorney General, and that they have characterized other custody as "constructive federal custody" and have been willing to give presentenced defendants credit under Section 3585 and its predecessor Section 3568 for certain time spent in state facilities, even though the defendant was not in the Attorney General's custody. (Pet. 15a-17a).

The court of appeals' analysis of the text of Section 3585(b) is logical, reasonable and consistent with the plain meaning of the statute.

b. The petition inaccurately argues that the history of the credit provision underscores its close ties to bail determinations. (Pet. 9-11). The problem with this historical analysis is that the modification to 18 U.S.C. § 3568, which provided credit for time in custody prior to the imposition of sentence for want of bail set for the offense under which sentence was imposed, applied only to cases where the person held in custody was subject to a mandatory minimum sentence. Additionally, that modification was repealed in 1966 and was replaced with far broader language which was still in effect in 1984, when Section 3585 was passed. The 1966 revision provided that credit was to be afforded to any individual held presentence "in custody in connection with the offense or acts for which sentence was imposed".

Consequently, this legislative history, including the

deletion of the limiting language "for want of bail", supports the argument that Congress did not hinge the credit determination upon whether bail had been afforded. The law is clear that, but for an exception for those subject to mandatory minimum sentences, which lasted for only a short period of time, Congress has never limited the credit awarded to persons held in federal custody "for want of bail".

Moreover, the 1966 revision to Section 3568 is important because its broad standard of "custody", which was not tied to a formal bond or detention status under Section 3142, was the standard in effect at the time Section 3585 was enacted. The petition acknowledges that the phrase "official detention" in Section 3585(b) has the same meaning as the phrase "in custody" in its predecessor statute. (Pet. 11). Thus, "custodial" status, regardless of technical bond status under Section 3142, is the benchmark for determining credit for time served, as it was under Section 3568.

c. The petition erroneously argues that the court of appeals failed to give proper deference to the Bureau's interpretation of Section 3585(b).

Several other courts of appeals have taken issue with the BOP's interpretation of the statute. In United States v. Wickman, 955 F.2d at 594, Chief Judge Lay, the dissenting judge, wrote that, "I certainly acknowledge our duty to defer to administrative agencies' interpretations of the statutes, but when an interpretation runs contrary to the expressed language of

the statute such a view does not deserve consideration." In Moreland v. United States, 968 F.2d at 663-65, four judges sitting en banc joined Judge Heaney in a dissenting opinion rejecting the BOP's interpretation of the statute. The dissent argued that under Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984), "[i]f a court 'ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.'" Moreland v. United States, 968 F.2d at 663. The dissent then concluded that in light of the ordinary meaning of the phrase "official detention" and congressional intent to enlarge the class of defendants eligible for credit, deference to the interpretation of the BOP would be inappropriate under Chevron. Moreland v. United States, 968 F.2d at 664.

Another strong argument against deferring to the judgment of the Bureau was set forth by the Ninth Circuit in Brown v. Rison, 895 F.2d 533 (9th Cir. 1990), where the court concluded that an interpretation that leads to an unfair result cannot be considered reasonable. The court stated that "[f]or purposes of Section 3568, we cannot accept as reasonable a definition of 'custody' that excludes enforced residence under the conditions approaching those of incarceration; to do so would be contrary to the consideration of fairness that must have underlain Congress' provision of credit for time served." Brown v. Rison, 895 F.2d at 536.

Thus, several courts of appeals agree with the Third Circuit

that the Bureau's interpretation of 18 U.S.C. § 3585(b) should not be accorded any deference because of the absence of any support therefor in the statute or legislative history. (Pet. 18a).

5. The petition relies heavily on the BOP's interpretation of the statute. It should be noted that the BOP is a division of and directed by the Attorney General. Therefore, the BOP's interpretation of the statute is not neutral because they are under the umbrella of the Attorney General, whose mission it is to protect society by confining offenders, not releasing them.

6. The type of restrictive, jail-like pretrial confinement at issue in this case is the product of the United States Attorney's Office which is a division of the Attorney General's Office, the BOP, as well as the Solicitor General. Thus, the presentence credit issue in this case is of the Department of Justice's own making, and they should solve it internally in their agencies rather than petitioning this Court for a review of the statute.

7. The community treatment center in question in this case, the Volunteers of America in Baltimore, Maryland, is an accurate and reliable facility, which is utilized as a postsentence halfway house where defendants receive credit toward their sentences. (Pet. 17).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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